

## The Notary Public - A Forgotten Power

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### Recommended Citation

DePaul College of Law, *The Notary Public - A Forgotten Power*, 1 DePaul L. Rev. 273 (1952)  
Available at: <https://via.library.depaul.edu/law-review/vol1/iss2/10>

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that most cases which have held a will ineffective do so not because the change was attempted by will, but because the will was not in substantial compliance with the terms of the contract.<sup>30</sup>

The early Illinois decisions followed the strict compliance theory,<sup>31</sup> but have accepted substantial compliance when the insured has done all that was reasonably within his power, and only a ministerial act remains.<sup>32</sup> However, since the Illinois courts hold that the terms and conditions of the clause are for the protection and convenience of the insurer, the company, if it does not waive such right by interpleading, can insist upon strict compliance.<sup>33</sup> As to a will effecting a change, Illinois courts have allowed the change where the policy expressly provides,<sup>34</sup> but where the contract said a change other than by provisions in the contract was null and void, the will was held ineffective.<sup>35</sup>

### THE NOTARY PUBLIC—A FORGOTTEN POWER

The duties of the notary public are numerous<sup>1</sup> and well known in our society, and the exercise of these functions a common occurrence. Yet the careless and unconcerned way in which these acts are often performed indicates that many fail to appreciate the seriousness of the notary's function. It is the purpose of this comment to examine some of the legal results which flow from the proper or improper performance of the function of a notary public.

The most common act which the notary performs, and out of which

<sup>30</sup> *Smith v. Smith*, 172 F. 2d 399 (C.A. 8th, 1949); *Quinlan v. Quinlan*, 293 Ky. 565, 169 S.W. 2d 617 (1943); *Bennett v. Bennett*, 70 Ohio App. 187, 45 N.E. 2d 614 (1942); *Aetna Life Ins. Co. v. Mallory*, 291 Mich. 701, 289 N.W. 302 (1939); *Nance v. Hilliard*, 101 F. 2d 957 (C.A. 8th, 1939); cf. *Metropolitan Life Ins. Co. v. Dinzik*, 141 N.J. Eq. 336, 57 A. 2d 287 (Ch., 1948) where a change was attempted by a certified instrument.

<sup>31</sup> *Sun Life Assurance Co. v. Williams*, 284 Ill. App. 222, 1 N.E. 2d 247 (1936); *Equitable Life Assurance Society v. Stilley*, 271 Ill. App. 283 (1933); *Freund v. Freund*, 218 Ill. 189, 75 N.E. 925 (1905); *McEldowney v. Metropolitan Life Ins. Co.*, 347 Ill. 66, 179 N.E. 520 (1931).

<sup>32</sup> *Young v. American Standard Life Ins. Co.*, 398 Ill. 565, 76 N.E. 2d 501 (1948); *Kavanagh v. New England M.L. Ins. Co.*, 238 Ill. App. 72 (1925).

<sup>33</sup> *Kurgan v. Prudential Ins. Co.*, 340 Ill. App. 178, 91 N.E. 2d 620 (1950); *Young v. American Standard Life Ins. Co.*, 398 Ill. 565, 76 N.E. 2d 501 (1948).

<sup>34</sup> *Baldwin v. Begley*, 185 Ill. 180, 56 N.E. 1065 (1900).

<sup>35</sup> *Modern Woodmen of America v. Scott*, 201 Ill. App. 144 (1916).

<sup>1</sup> The notary public is "a public officer whose function is to administer oaths; to attest and certify, by his hand and official seal, certain classes of documents in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgements of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and waive protests in cases of loss or damage." *Black's Law Dictionary*, p. 1257 (3d ed., 1933).

the major portion of litigation in the field has arisen, is his certification of acknowledgement of deeds and other instruments relating to real estate. "The notary's certificate of acknowledgement of a deed is the pillar of our property rights. All titles depend on official records; and all records depend on the notary's certificate of acknowledgement."<sup>2</sup>

In Illinois, deeds, mortgages, or other writings relating to real estate may be acknowledged before a notary public. This act must be attested by the notary's official seal,<sup>3</sup> and a private seal will not suffice. If properly authenticated, the certificate is *prima facie* proof of the execution<sup>4</sup> of the instrument and of its acknowledgement<sup>5</sup> by the maker.

The certificate is also entitled to some weight as tending to show a delivery of the instrument especially where the certificate recites a delivery by the grantor, and even more so if the acknowledgement is made in the grantee's presence.<sup>6</sup> A deed is presumed to have been delivered from its date, and the fact that the certificate of acknowledgement bears a later date is not in itself enough to rebut that presumption.<sup>7</sup>

If, on the other hand, a deed is not acknowledged, it is still valid as a transfer of title,<sup>8</sup> except as to the homestead estate.<sup>9</sup> The deed, if recorded, will also be deemed notice to subsequent purchasers. When such a deed is put in evidence, however, its execution must be proved.<sup>10</sup> This is a severe handicap, especially in the case of old deeds, and is a problem which does not occur with acknowledged deeds.

An Illinois statute gives the notary power to administer oaths.<sup>11</sup> The power is not incidental to his office, but rather dependent on statutory enactment,<sup>12</sup> and even extends to proceedings not commenced before the notary.<sup>13</sup>

A notary was formerly required by statute to keep records, but that

<sup>2</sup> Wigmore, *Notaries Who Undermine Our Property System*, 22 Ill. L. Rev. 748, 749 (1928).

<sup>3</sup> Ill. Rev. Stat. (1951) c. 30, § 19.

<sup>4</sup> *Curtis v. Curtis*, 398 Ill. 442, 75 N.E. 2d 881 (1947); *Houlihan v. Morrissey*, 270 Ill. 66, 110 N.E. 341 (1915); *Spencer v. Razor*, 251 Ill. 278, 96 N.E. 300 (1911).

<sup>5</sup> *Lake Erie and Western R. Co. v. Whitham*, 155 Ill. 514, 40 N.E. 1014 (1895).

<sup>6</sup> *Warrick v. Hull*, 102 Ill. 280 (1882).

<sup>7</sup> *Dunn v. Heasley*, 375 Ill. 43, 30 N.E. 2d 628 (1940).

<sup>8</sup> *Zilvitis v. Szczudlo*, 409 Ill. 252, 99 N.E. 2d 124 (1951).

<sup>9</sup> Ill. Rev. Stat. (1951) c. 52, § 4; *Logue v. Von Almen*, 379 Ill. 208, 40 N.E. 2d 73 (1942); *McNichols v. McNichols*, 299 Ill. 362, 132 N.E. 448 (1921); *McCreight v. Pinkerton*, 258 Ill. App. 477 (1930).

<sup>10</sup> Ill. Rev. Stat. (1951) c. 30, § 30.

<sup>11</sup> Ill. Rev. Stat. (1951) c. 101, § 1.

<sup>12</sup> *Trevor v. Colgate*, 181 Ill. 129, 54 N.E. 909 (1899).

<sup>13</sup> *In re Roth*, 398 Ill. 131, 75 N.E. 2d 278 (1947).

provision was repealed in 1949.<sup>14</sup> Nevertheless, it appears that if such a record is kept, it will, if duly certified, be competent evidence to prove the facts stated therein,<sup>15</sup> and can, for example, be *prima facie* evidence that payment of a bill of exchange has been demanded and refused and that notice of dishonor has been given.<sup>16</sup> A notary's certificate may also be used to prove such facts,<sup>17</sup> although a notarial certificate of protest made by a foreign notary may not.<sup>18</sup>

Since the notarial act has many important effects, it becomes material to determine how the notary's certificate can be overcome.

A notary's certificate of acknowledgement can be overcome only by proof which is clear and convincing,<sup>19</sup> and the party who seeks to impeach the certificate has the burden of proof.<sup>20</sup> The unsupported testimony of the grantor is not sufficient to overcome the certificate,<sup>21</sup> even if slightly corroborated.<sup>22</sup> Furthermore, the testimony of a notary who seeks to impeach his own certificate will be given little weight.<sup>23</sup> When the facts as they appear remove the integrity which ordinarily attaches to the certificate, such as where the notary testifies that he made an acknowledgement in blank, the certificate loses its sanctity.<sup>24</sup>

Mere proof that the signature was not the grantor's handwriting does not overcome the certificate since there might have been an adoption.<sup>25</sup> The uncontradicted testimony of three disinterested persons that at least one of them was in attendance of the grantor at all times and that, therefore, the purported acknowledgement was never made, was held sufficient to overcome the certificate.<sup>26</sup> A certificate was of no effect where the grantor was illiterate and there was no explanation to her of the nature and legal effect of the document she was signing.<sup>27</sup>

<sup>14</sup> See Ill. Rev. Stat. (1951) c. 99, § 11.

<sup>15</sup> Ill. Rev. Stat. (1951) c. 99, § 12.

<sup>16</sup> *Montelius v. Charles*, 76 Ill. 303 (1875).

<sup>17</sup> *Sublette Exchange Bank v. Fitzgerald*, 168 Ill. App. 240 (1912).

<sup>18</sup> *McAllister v. Smith*, 17 Ill. 328 (1856); *Vaughan v. Potter*, 131 Ill. App. 334 (1907).

<sup>19</sup> *Koepke v. Schumacher*, 406 Ill. 93, 92 N.E. 2d 152 (1950); *Fangrow v. Buetow*, 399 Ill. 127, 77 N.E. 2d 39 (1948); *Spencer v. Razor*, 251 Ill. 278, 96 N.E. 300 (1911); *Tunison v. Chamblin*, 88 Ill. 378 (1878).

<sup>20</sup> *Duncan v. Duncan*, 203 Ill. 461, 67 N.E. 763 (1903).

<sup>21</sup> *Stone v. Stone*, 407 Ill. 66, 94 N.E. 2d 855 (1950); *Pfaff v. Petrie*, 396 Ill. 44, 71 N.E. 2d 345 (1947); *Moneta v. Hoinacki*, 394 Ill. 47, 67 N.E. 2d 204 (1946); *Finney v. White*, 389 Ill. 374, 59 N.E. 2d 859 (1945); *Herpich v. Williams*, 300 Ill. 540, 133 N.E. 220 (1921); *McReynolds v. Stoats*, 228 Ill. 22, 122 N.E. 860 (1919).

<sup>22</sup> *Parlin and Orendorff Co. v. Hutson*, 198 Ill. 389, 65 N.E. 93 (1902).

<sup>23</sup> *Union Colliery Co. v. Fishback*, 299 Ill. 165, 132 N.E. 492 (1921).

<sup>24</sup> Note 22 *supra*.

<sup>25</sup> *Tunison v. Chamblin*, 88 Ill. 378 (1878).

<sup>26</sup> *Lewis v. McGrath*, 191 Ill. 401, 61 N.E. 135 (1901).

<sup>27</sup> *Zubas v. White*, 404 Ill. 400, 89 N.E. 2d 46 (1949).

By way of a general rule it can be said that any acknowledgement taken before a notary public who is financially interested in the transaction is a nullity.<sup>28</sup>

A facet of this problem, which is of vital interest to attorneys, is the effect of an acknowledgement or taking of an affidavit by an attorney. Courts once felt that an attorney who made affidavits in a case in which he was professionally interested was biased,<sup>29</sup> and they frowned upon such practice.<sup>30</sup> Even so, an early case held that the admission in evidence of a petition sworn to before a notary who was the attorney for the petitioners did not amount to reversible error.<sup>31</sup> The court, in *Ogden Building and Loan Ass'n v. Mensch*,<sup>32</sup> remarked by way of dicta, that an attorney of a party who is beneficially interested in a deed or mortgage, is not disqualified to certify an acknowledgement in an official capacity.

The fact that a decree allows attorney's fees does not amount to such a pecuniary interest as would invalidate an affidavit sworn to before him as a notary by one of the parties.<sup>33</sup>

There are no recent Illinois cases on the point, but it would seem a fair assumption that unless actual pecuniary interest of an attorney is proved he is not disqualified from acting as a notary in a case in which he is professionally interested.

An acknowledgement of a deed of trust taken by one of the trustees thereunder is not valid,<sup>34</sup> and the acknowledgement of a chattel mortgage by one of the mortgagees, a justice of the peace, was held ineffective.<sup>35</sup>

It had been held in Illinois that an acknowledgement taken by a stockholder of a corporation which was a party to the transaction was not valid, on the theory that the stockholder was the real party in interest where corporate matters are concerned.<sup>36</sup> The rule did not apply where the notary was merely an officer of the corporation. In 1935, an act was passed which provides that it shall not be an objection to the validity of any act of a notary that such notary is an officer, stockholder, or employee of a corporation which is a party to the instrument acknowledged by such corporation, provided that this notary did not sign the instrument on behalf of the corporation.<sup>37</sup>

<sup>28</sup> *Logue v. Von Almen*, 379 Ill. 208, 40 N.E. 2d 73 (1942).

<sup>29</sup> *Peck v. People*, 153 Ill. 454, 457, 39 N.E. 117, 118 (1894).

<sup>30</sup> *Linck v. Litchfield*, 141 Ill. 469, 478, 31 N.E. 123, 125 (1892).

<sup>31</sup> *Hollenbeck v. Detrick*, 162 Ill. 388, 44 N.E. 732 (1896).

<sup>32</sup> 196 Ill. 554, 63 N.E. 1049 (1902).

<sup>33</sup> *McCormick v. Higgins*, 190 Ill. App. 241 (1914).

<sup>34</sup> *Darst v. Gale*, 83 Ill. 136 (1876); *Russell v. Bosworth*, 106 Ill. App. 314 (1902).

<sup>35</sup> *Hammers v. Dole*, 61 Ill. 307 (1871).

<sup>36</sup> *Ogden Building and Loan Ass'n v. Mensch*, 196 Ill. 554, 63 N.E. 1049 (1902).

<sup>37</sup> Ill. Rev. Stat. (1951) c. 99, § 14.

Where an error in a certificate of acknowledgment was clerical, the Illinois court said it would disregard it or correct it in considering important rights.<sup>38</sup> In that case, the certificate read "the contents and meaning of said husband were . . . made known . . .," and the court corrected it to read "deed" instead of "husband." The omission of the notary to write the words "notary public" after his signature will not render the certificate invalid where he describes himself as a notary in the body of the instrument, and it appears he was acting officially.<sup>39</sup>

A certificate reading "who . . . personally known to me . . ." was held to be a valid acknowledgement, since it was sufficient in substance.<sup>40</sup>

It should be noted that the statute requires:

No . . . officer shall take the acknowledgement of any person to any deed . . . unless the person offering to make such acknowledgement shall be personally known to him to be the real person who and in whose name such acknowledgement is proposed to be, or shall be proved to be such by a credible witness.<sup>41</sup>

Violation of this provision has caused comment in the past.<sup>42</sup> It is well known that currency exchange notaries in urban areas frequently disregard the requirement, as do notaries in large office buildings.

An acknowledgement of a deed which omitted the name of the county in the caption, but which had a seal stating the county, has been held valid.<sup>43</sup> A certificate bearing the notary's seal but on which the name of the notary is not attached is invalid.<sup>44</sup> The fact that a notary writes the word "clerk" after his name will not vitiate an affidavit.<sup>45</sup>

An Illinois statute provides that a notary, before entering on his duties, must have a memorandum of his appointment and the time when his office will expire, entered in the office of the county clerk of his county,<sup>46</sup> but the statute does not invalidate acts performed by a notary who has not complied with this provision.<sup>47</sup>

It is no objection to an acknowledgement taken by a notary in one county in Illinois that he resides in another county.<sup>48</sup> The statute provides that once a notary is duly qualified, he has the authority to execute

<sup>38</sup> *Calumet and Chicago Canal and Dock Co. v. Russell*, 68 Ill. 426 (1873).

<sup>39</sup> *Lake Erie and Western R. Co. v. Whithan*, 155 Ill. 514, 40 N.E. 1014 (1895).

<sup>40</sup> *Hartshorn v. Dawson*, 79 Ill. 108 (1875).

<sup>41</sup> Ill. Rev. Stat. (1951) c. 30, § 23.

<sup>42</sup> *Wigmore*, op. cit. supra note 2.

<sup>43</sup> *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148 (1866).

<sup>44</sup> *Clark v. Wilson*, 127 Ill. 449, 19 N.E. 860 (1889).

<sup>45</sup> *Gaynor v. Hibernia Savings Bank*, 68 Ill. App. 485 (1896), aff'd 166 Ill. 577, 46 N.E. 1070 (1897).

<sup>46</sup> Ill. Rev. Stat. (1951) c. 99, § 5.

<sup>47</sup> *Keller v. Anton*, 316 Ill. App. 114, 43 N.E. 2d 690 (1942); *McCormick v. Higgins*, 190 Ill. App. 241 (1914).

<sup>48</sup> *Guertin v. Mombteau*, 144 Ill. 32, 33 N.E. 49 (1893).

the duties of his office throughout the state, while he resides in the same county in which he was appointed.<sup>49</sup>

The fact that a notary, in his own county, does not authenticate the jurat with his official seal in an affidavit will not invalidate the instrument because the court will take judicial notice of the notaries public in the county in which the court entertains jurisdiction.<sup>50</sup>

No Illinois cases could be found in which an attempt was made to hold a notary liable to one injured by his negligence or fraud. It is manifest, however, that grave consequences can result from an improper performance of the notary's functions, especially in regard to deeds. A notary might be held liable for a false certification in the same way as a certified public accountant.<sup>51</sup> In addition, it might be possible to satisfy a judgment against him out of the bond<sup>52</sup> which every notary must obtain.

The notary and his role in society seem to have been neglected for too long. A serious study of the situation by legislators and lawyers is in order.

### LABOR UNION DISAFFILIATION—PROBLEM OF CONTRACT BAR AND CONTRACT ASSUMPTION

In the comparatively unexplored field of labor relations no more trackless area can be found than that reached when a union local votes to disaffiliate in toto from the parent organization or from the international during the term of a valid, binding collective bargaining agreement. The effect of such disaffiliation might be felt on future certification proceedings, or on the rights to the benefits and burdens of the existing contract between the employer and the local. Will the existing contract act as a bar to certification proceedings for a new representative? If a new local should be certified, will that local be forced to assume the existing contract, or may it bargain on its own behalf?

Answers to these questions<sup>1</sup> serve as a most fertile ground for labor litigation today.

Basically, the problems of contract bar and of contract assumption are closely allied to the relationship of union to employee. That relationship may be described either as agent-principal or as third party beneficiary. The National Labor Relations Board, in attempting to decide the contract

<sup>49</sup> Ill. Rev. Stat. (1951) c. 99, § 10.

<sup>50</sup> *Hertig v. People*, 159 Ill. 237, 42 N.E. 879 (1896); *Schaefer v. Kienzel*, 123 Ill. 430, 15 N.E. 164 (1888); *Dyer v. Flint*, 21 Ill. 80 (1859).

<sup>51</sup> *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

<sup>52</sup> Ill. Rev. Stat. (1951) c. 99 § 4.

<sup>1</sup> Limited to those situations where the local disaffiliates in toto. Also limited to the problem of contract acting as a bar to certification proceedings, and the necessity of contract assumption by successor union. For a discussion of property rights upon disaffiliation see 131 ALR 902 (1941).